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In The
Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICI CURIAE ROBERT AND LUANN WHITMER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Robert and Luanne Whitmer, individually and as guardians of Shana, Hanna and Denel Whitmer, were the plaintiffs in *Whitmer et al. v. Yuk, et al.*, Washington Supreme Court No. 69327-7. The Whitmers' case was consolidated with the Guillens' case and this certiorari proceeding is taken from the decision of the Washington Supreme Court in both cases.

This amicus brief is limited to the power or lack of power of Congress to enact 23 U.S.C. § 409. In contrast to the Guillens' and fellow amici's briefs, this brief argues that § 409 is unconstitutional no matter how narrowly the Court construes it. It views Congress' statutory scheme as a whole, and from the perspective of the citizens of a state.

The Whitmers have argued that § 409 is unconstitutional at every stage of these proceedings, unlike the Guillens, who did not raise the issue in the trial court or the State Court of Appeals. Pet. Br. 11-14. The Whitmers' constitutional challenge prompted the Washington Supreme Court to call for supplemental briefing on the issue from both parties after the cases were consolidated. *Id.* at 13-14. The Washington Supreme Court considered the facts of the Whitmer case as well as the Guillen case in rendering its decision. Thus, the facts of and arguments raised in both cases are woven into the fabric of this case and cannot be unravelled.

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[1] No counsel for a party authored any part of this brief, nor did any person or entity other than the Whitmers and their counsel contribute monetarily to the preparation or submission of this brief.

The Guillen and Whitmer document requests are quite different. The Guillens chose to write narrow document requests and did not seek discovery of any documents protected by 23 U.S.C. § 409. Guillen Br. in Opp. at 1. In contrast, the Whitmers broadly requested any documents relating to accidents at the site, whether or not those documents were protected by § 409. Whitmer Br. in Opp. 4-5. Moreover, in the *Guillen* case, Pierce County had actually applied for federal funding for improvements at the accident intersection. Pet. App. A, 59-61. By contrast, the intersection in the *Whitmer* case had never been the subject of an application for federal funds under 23 U.S.C. § 152. *Id.*

Petitioner settled with the Whitmers and argued to this Court that the Whitmers are not parties to this certiorari proceeding. Pet. Resp. in Opp. To Whitmer Mot. To be Deemed Parties. The Whitmers noted that they invested substantial resources in persuading the Washington State Supreme Court that § 409 is unconstitutional. The settlement should have brought an end to the litigation, but it did not. Petitioner County continues to attack the decision rendered by the Washington State Supreme Court in the Whitmers' case as well as the Guillens' case. The Whitmers are interested in defending the decision rendered in their case for the benefit of all persons who may be injured in the future on negligently designed and maintained roads.

This Court held that the Whitmers are not parties, but may file a brief as amicus curiae. Order of 6/3/02. In addition, letters of consent to the Whitmers' participation as amici have been filed with this Court.

SUMMARY OF ARGUMENT

Congress did not have the power under the Constitution to enact 23 U.S.C. § 409. The proposed sources of power are the Commerce Clause and the Spending Clause, each as augmented by the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 1, 3, 18. The latter clause only applies if the former clauses do, and neither of them authorizes § 409.

The parties and amici have suggested that § 409 be interpreted broadly (Petitioner, Amicus State of Louisiana, Amicus Association of American Railroads) or narrowly (Respondents Guillen, Amicus Washington State Trial Lawyers Association Foundation), or simultaneously narrowly and broadly (United States), and that it is ambiguous (Respondents Guillen). Both the broad and narrow constructions suffer from the same lack of congressional power.

Section 409 is not authorized by the Commerce Clause because it does not "regulate Commerce . . . among the several States. . . . " U.S. Const. art. I, § 8, cl. 3. Instead, § 409 regulates non-commercial, non-economic activity – the discovery and admission into evidence in state court proceedings on state court claims of state-generated documents. The state court proceedings and the documents protected are inherently intrastate, do not travel in and are not part of interstate commerce. Section 409 lacks any jurisdictional element that might tie its restrictions into interstate commerce.

Commerce Clause legislation may only regulate commerce by operating upon the citizens of the states. But this statutory scheme, especially sections 152 and 409, operates directly on the states and their judges. It thus

fails Commerce Clause scrutiny for this independently sufficient reason.

Nor does the Spending Clause justify § 409. Congress can "encourage" the states to adopt a particular statute or regulation by conditioning the receipt of federal funding on a state's voluntary adoption of the requirement. But § 409 is the antithesis of a condition to be accepted or rejected; it categorically requires states to deny discovery or admission into evidence of particular documents "notwithstanding any other provision of law. . . . " Section 409 is a stick, not a carrot, and fails Spending Clause scrutiny for this reason alone. Moreover, § 409's unconditional nature impermissibly coerces the States' participation, and encroaches far into truly local matters, reaching beyond the "general welfare" and into the sole purview of the States.

Therefore, the Court should hold § 409 unconstitutional.

ARGUMENT

A. The Commerce Clause Does Not Sustain Section 409 Because The Statute Does Not Regulate Commerce But Instead Regulates State Court Judges And State Officials In A Manner Insufficiently Related To Interstate Commerce.

Section 409 cannot be sustained as an exercise of the Commerce Clause. Petitioner County, the United States, and the amici supporting Petitioner fail to analyze § 409

under this Court's most recent cases on the Commerce Clause, *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).[2] Amici States do not even argue that § 409 can be sustained under the Commerce Clause. Thus, not one of the 196 pages of briefs submitted by Petitioner, the United States, and their amici even attempts to sustain § 409 under the *Lopez/Morrison* analysis. Those (and many more) cases make clear that a statute like § 409 has never fallen within Congress' Commerce Power.

On the contrary, § 409 is far more offensive to our federalism than the laws stricken in *Lopez* and *Morrison*: At least in those cases, Texas and Virginia could carry out their own gun possession and rape laws despite the federal law. The effect of § 409, however, is to displace Washington's law, without providing a federal remedy.

1. Section 409 Does Not Regulate "Commerce" Or Any Activity "Among The Several States."

The Commerce Clause empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . " U.S. Const. Art. I, § 8, cl. 3. Since at least *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), intrastate

[2] *Lopez* and *Morrison* are cited by Petitioner and its amici only for the long-established principle that the Commerce Clause permits commerce to regulate channels and instrumentalities of interstate commerce, as well as activities substantially related to interstate commerce. Pet. Br. 3; PLAC Amicus Br. 6, 8; AAR Amicus Br. 24. The United States cites *Lopez* for the same proposition and to demonstrate the Guillens' standing to challenge § 409. U.S. Br. 25, 42.

activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" have been within Congress' power to regulate. Yet at the same time, "the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Lopez*, 514 U.S. at 557 (*quoting Jones & Laughlin*, 301 U.S. at 37). Thus, to safeguard the promise of liberty harbored in our dual system of government, *see Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991), this Court has long "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S at 557 (*citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964)).

Under this analysis, and in light of the intergovernmental structure created by the Constitution, many cases have established that Congress may: (1) "regulate the use of the channels of interstate commerce"; (2) "regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "regulate those activities having a substantial relation to intrastate commerce . . . i.e., those activities that substantially affect intrastate commerce." *Lopez*, 514 U.S. at

558-59 (*citing, inter alia, Jones & Laughlin, Hodel, Perez* and *Heart of Atlanta, supra*).

Applying this well established analysis, this Court noted in *Lopez* that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), must be analyzed under the third category of congressional power because it did not regulate the use of the channels of interstate commerce or protect an instrumentality of interstate commerce or a thing in interstate commerce. 514 U.S. at 559. Similarly, § 409 regulates the admission and discovery of documents in court proceedings. It does not regulate channels of interstate commerce, instrumentalities of interstate commerce or things of interstate commerce. Thus, "consistent with the great weight of [this Court's] case law, . . . the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." 514 U.S. at 559.

The Court concluded in *Lopez* that § 922(q) was simply a criminal statute that "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. The Court similarly concluded in *Morrison* that, "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613. The Court in *Morrison* went on to consider whether gender-related violence might still be regulated under the Commerce Clause on the theory that the cumulative effect of gender-related violence substantially affects commerce. The Court declined to adopt a "categorical rule against aggregating the effects of any noneconomic activity", 529 U.S. at 613, but ultimately rejected the argument that "Congress may regulate noneconomic, violent criminal conduct based

solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

Applying this Court's well-established Commerce Clause analysis, § 409 simply does not purport to regulate commercial or economic activity. Discovery of documents and admission of evidence in a court proceeding is not a commercial or economic activity. The administration of justice has not been an article of commerce since the barons gathered at Runnymede to force King John to renounce the sale of right or justice. There can be no commercial trade or bargaining in civil discovery or the administration of trial. The administration of justice is simply not a commercial or economic activity, whether one adopts a narrow interpretation of the commerce clause, 514 U.S. at 584 (Thomas, J., concurring), or a broad view, 514 U.S. at 628-29 (Breyer, J., dissenting).

Indeed, § 409 is even farther removed from commercial or economic activity than the Gun-Free School Zones Act struck down in *Lopez*. After all, the purchase and transportation of guns is in fact commercial activity, 514 U.S. at 603 (Stevens, J., dissenting), whereas the documents at issue in § 409 were not introduced into commerce, do not come from a commercial source, and do not move in commerce.

Not only does § 409 fail to regulate commercial or economic activity, but it fails to regulate activity "among the several states." The conduct of state court proceedings is inherently and inescapably intrastate. Nor can the discovery and admission into evidence of particular documents be aggregated in a way that substantially affects commerce. *Lopez*, 514 U.S. at 559-60. In some cases, this Court has held that Congress can regulate intrastate

activity where the aggregate of all such activity substantially affects interstate commerce, *id.*, because each intrastate transaction substitutes for a potential interstate transaction. For instance, in *Jones & Laughlin,* the Court concluded that "industrial labor relations [could not] constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war." 301 U.S. at 41. Similarly, in *Wickard v. Filburn*, 317 U.S. 111 (1942), "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, the Court concluded that homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and "in this sense competes with wheat in commerce." 317 U.S. at 128.

By contrast, discovery and admission of documents in State court proceedings never "aggregate" to become a substitute for interstate activity. Litigation over an automobile accident is inherently local. The respondents' requested discovery of accident records from Petitioner County does not in any sense substitute for the discovery of accident records from Oregon, Idaho or any other state. Thus, § 409 not only fails to regulate commerce, it fails to regulate any activity "among the several states."

2. Section 409 Lacks Any Express Jurisdictional Link To Interstate Commerce, Lacks Congressional Findings Of Such A Link, And Has Only The Most Attenuated Factual Link With Interstate Commerce.

In addition, § 409 lacks any of the three additional indicia of substantial effects on interstate commerce

recognized in this Court's precedents: an express jurisdictional element linking the facts of the case to interstate commerce; congressional findings of a link with interstate commerce; and a factual link between the regulated activity and interstate commerce. *See Lopez*, 514 U.S. at 561-64 (*citing, inter alia, United States v. Bass*, 404 U.S. 336 (1971); *McClung*, 379 U.S. at 304; *Perez*, 402 U.S. at 156; *Jones & Laughlin*, 301 U.S. at 37); *Morrison*, 529 U.S. at 613-16 (citing these and other cases).

The Court noted in *Lopez* that the Gun-Free School Zones Act lacked any express jurisdictional element "which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. Similarly, in *Morrison*, the Court noted that the Violence Against Women Act of 1994 lacked any express link with interstate commerce. 529 U.S. at 613. So too, § 409 lacks any requirement that the documents or information which may not be discovered or admitted into evidence are linked in any way to interstate commerce. Indeed, the facts of these cases belie such a link. The Guillen collision occurred at a local intersection in unincorporated Pierce County. Pet. App. A-5-6. Pierce County is 150 miles from Oregon, the closest neighboring state, and 250 miles from Idaho, the only other state bordering Washington. Nothing in the record suggests that anyone involved in the collision was traveling in interstate commerce. The Court may take judicial notice that the intersection of 168th Street East and B Street East in Pierce County is approximately 4 miles from the nearest federal highway, Interstate 5. *See*

Washington State Department of Transportation Highway Map, Puget Sound North.[3]

Similarly, nothing in the Whitmer case suggests that anyone involved in the Whitmer collision was traveling in interstate commerce. Pet. App. A. 16. The Whitmers' complaint alleged that the plaintiffs and defendants were all residents of the State of Washington, and defendants City of Lakewood, Pierce County and City of Tacoma, are all municipal corporations under the laws of the State of Washington. Whitmer Clerk's Papers 538. The Court may take judicial notice that the intersection of 75th and Custer Road in Lakewood, Washington, is approximately one mile from the nearest federal highway, Interstate 5. WSDOT Map, supra.[4]

Not only does § 409 lack any jurisdictional link to interstate commerce, much of the information shielded by § 409 clearly has nothing to do with interstate commerce. Section 409 shields documents and data compiled or collected pursuant to 23 U.S.C. § 152. Section 152 directs the states to identify obstacles and hazards which may be a danger to any motorist, bicyclist, or pedestrian. Section 152(a)(1). Funds are authorized for expenditure on bicycle or pedestrian pathways or trails, as well as public roads. Section 152(c). Obviously, the vast majority of bicyclists and pedestrians are not involved in interstate commerce,

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[3] http://www.wsdot.wa.gov/Communications/Map/Map-Quadrant-PDFs/enlargements/PugetSoundN.pdf. Although not marked on this map, the intersection is located just below the name "Spanaway" in the lower center portion of the map.

[4] Although not marked, the intersection is just above the name "Lakewood."

but purely intrastate activities. Nor are the documents withheld under §409 linked in any way to interstate commerce. Nothing in the record supports the conclusion that any of the 56 accident reports withheld in the Whitmer case, Pet. App. A-18, are linked in any way with interstate commerce. Nor is there any indication that the private traffic impact analysis for a Chevron Station and a McDonald's restaurant, also withheld in the Whitmer case, Pet. App. A-19, are linked in any way to interstate commerce. Nor did Petitioner or the City of Lakewood ever apply for federal funds to improve the intersection where the Whitmers' children were injured.

Nor did Congress hold hearings or make findings that the discovery or admission of the documents referenced in § 409 were substantially related to interstate commerce. No hearings or findings support any link between § 409 and interstate commerce. Petitioner and the United States point to terse statements of Congressional intent, to a statement in a brief by the United States as amicus curiae in a case in which this Court denied certiorari, Pet. Br. 4-5, U.S. Br. 3-4, and to an internal memorandum from the Department of Transportation. La. Amicus Br. App. These brief comments are not Congressional findings and do not even assert that there is a link between § 409 and interstate commerce.

Finally, the link between the regulated activities and interstate commerce is far too attenuated. For example, several chains of linkage were suggested in *Lopez*: (1) possession of a firearm in a school zone may result in violent crime, violent crime imposes costs on society, through the mechanism of insurance those costs are spread throughout the population, and, violent crime reduces the willingness of individuals to travel, 514 U.S.

at 563-64; (2) guns in schools threaten the educational process, reducing productivity, which adversely affects the national economic well-being. 514 U.S. at 564. This Court rejected these attenuated chains of reasoning because they inevitably lead to the conclusion that any activity can be linked to the Commerce Clause, and swallow up the sovereignty of the states in such traditional areas as the police power and family law. 514 U.S. at 564. The Court rejected a similarly attenuated chain of reasoning in *Morrison*. 529 U.S. at 615-16.

The chain of reasoning argued by Petitioner and the United States between Section 409 and interstate commerce is even more attenuated than those rejected in *Lopez* and *Morrison*. They argue: (1) discovery and admission of the § 409 documents and data could lead to increased litigation and higher verdicts in highway safety lawsuits; (2) this specter would deter state officials from participating in the federal program or they "might not be optimally thorough and candid in doing so"; (3) federal funds therefore will be used less effectively to improve safety; (4) the misapplication of funds will result in decreased safety and increased accidents; (5) which will "literally impede the flow of interstate commerce." Pet. Br. 27-29, U.S. Br. 41-42.

The supposed chain between § 409 and interstate commerce is both longer and weaker than the chains found insufficient in *Lopez* and *Morrison*. Equally importantly, if Petitioner's chain of argument is sufficient to justify regulation under the Commerce Clause, then Congress' powers to regulate commerce are virtually unlimited. Under Petitioner's reasoning, by virtue of the Commerce Clause Congress could tell the States how their police officers must fill out, maintain and file accident reports for

every local auto collision in the United States, on the theory that such uniformity would help prevent auto accidents in interstate commerce. On a similar basis, Congress could establish specifications for every city road and country lane, set speed limits everywhere, impose a national motor vehicle code and rules of the road, establish driver's license requirements, regulate all aspects of civil service touching upon highway design, totally preempt state automobile liability law, establish a national traffic police force, or require that all automobile accident cases be litigated in a federal forum. The Court should reject these highly attenuated and hypothetical chains of causation.

3. Section 409 Cannot Be Justified As An Integral Part Of The Highway Safety Act Of 1973.

Unable to justify § 409 under this Court's precedents, Petitioner and its amici suggest that § 409 should be upheld as an "integral part" of a larger regulatory scheme:

> A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid Congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Pet. Br. 33, AAR Amicus Br. 22, PLAC Amicus Br. 8-9 (*quoting Hodel,* 452 U.S. at 329 n. 17 (1981)). But § 409 fails even the *Hodel* test.

Petitioner's "integral part of the regulatory program" argument comes from a footnote in *Hodel*, 452 U.S. at 329 n. 17, which is later repeated in *F.E.R.C. v. Mississippi*, 456 U.S. 742, 757 n. 22 (1982). This footnote, on which this Court has apparently not relied in the 20 years since *F.E.R.C.*, was a *dictum* in *Hodel* and in *F.E.R.C.* The *Hodel* footnote follows eight pages of detailed analysis of 21 different provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* 452 U.S. at 321-29. The Court had already held that the district court erred in holding these 21 provisions unconstitutional, finding the district court's rationale "untenable," 452 U.S. at 323, finding "little difficulty in concluding that the Congressional finding in this case satisfied the rational-basis test," 452 U.S. at 325, and holding that the district court erred in ruling that the 21 challenged provisions were not reasonably related to the legitimate goal of protecting interstate commerce. 452 U.S. at 327. Similarly, in *F.E.R.C.*, the Court carefully analyzed the three challenged provisions of the Public Utility Regulatory Policies Act of 1978, 456 U.S. at 746-757, "readily conclud[ing] that the District Court's analysis and the appellees' arguments are without merit so far as they concern the Commerce Clause." 456 U.S. at 753. Thus, even under *Hodel* and *F.E.R.C.*, the Court should analyze the statutory provision centrally challenged in this case, § 409.

4. Section 409 Is Only "Integral" To A Statutory Scheme That Impermissibly Attempts To Directly Regulate The States.

It does not help Petitioner to argue that § 409 is "integral" to 23 U.S.C. § 152 because § 152 itself cannot be

justified under the Commerce Clause. Section 152 operates directly on the states, and not on the citizens of the states, when it unambiguously requires state officials to take particular actions: "Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements. . . . " Pet. App. J 2-3, § 152(a)(1). Section 152 thus runs afoul of the well-established principle that Congress may not regulate the states directly under the Commerce Clause. *See, e.g., Printz v. United States*, 521 U.S. 898, 923-24 (1997); *New York v. United States*, 505 U.S. 144, 166 (1992).

In *New York*, this Court first distinguished its somewhat "unsteady" line of precedent concerning statutes that subject states to generally applicable laws because certain provisions of the Act in question (the Low-Level Radioactive Waste Policy Amendments Act of 1985) purported to directly regulate the states. 505 U.S. at 160-61. Similarly, § 152 commands the states, and only the states, to comply with its requirements. It simply commandeers state officers to do Congress' bidding. But *New York* holds that Congress has no power to commandeer state officers in this manner. 505 U.S. at 175-76. *Printz* also holds that Congress may not commandeer state officers to perform federal program requirements. 521 U.S. at 933. Simply put, the "Federal Government may not compel the states to enact or administer a federal regulatory program." *Printz*, 521 U.S. at 933 (*quoting New York*, 505 U.S. at 188). That is precisely the problem with Congress' scheme under §§ 152 and 409.

Indeed, § 409 itself operates directly on states through their judges, requiring them to deny discovery or admission of documents gathered for § 152 purposes. But § 409

goes far beyond other federal statutes that merely require state judges to enforce federal laws. *See, e.g., Printz*, 521 U.S. at 906-07. The valid federal laws cited in *Printz* imposed primary duties on citizens, requiring state judges to enforce them under the Supremacy Clause. For instance, the Courts of Rhode Island could not decline to entertain an action to recover damages for a substantive violation of the Federal Emergency Price Control Act. *Testa v. Katt*, 330 U.S. 386 (1947). Here, by contrast, Congress does not purport to regulate any form of interstate commerce under § 409 or § 152, but rather has issued free-standing directives to state judges, telling them how they are to enforce the laws and rules of their own states in cases that lack any connection to interstate commerce. Congress thus goes too far.

B. Section 409 Is Not Authorized By The Spending Clause Because: (1) It Is Not A Condition On Spending; (2) It Is Impermissibly Coercive; And (3) The 10th Amendment Provides An Independent Bar To Congressional Interference With Washington Citizens' Decision To Waive Sovereign Immunity And Subject Their Governments To Suit On The Same Terms As Any Washington Citizen.

Section 409 is not authorized by the Spending Clause, U.S. Const. art. I, § 8, cl. 1, for several reasons. First, § 409 is not a Spending Clause statute because it does not purport to give the states the choice of accepting or rejecting particular conditions on the availability of federal funding; *a fortiori*, Congress has not unambiguously conditioned the State's receipt of funds. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Second, if § 409 is read

as a condition on funding, the only possible interpretation of it would be that the Secretary could cut off all federal highway funds for noncompliance, rendering § 409 impermissibly coercive. *Id.* Third, § 409 does not affect the "general welfare" but rather runs aground on an independent bar – the Tenth Amendment – which forbids congressional interference with Washington citizens' decision to waive sovereign immunity and subject their governments to suit on the same terms as any Washington citizen. *Id.*

Dole considered the constitutionality of 23 U.S.C. § 158, which directed the Secretary of Transportation to withhold a portion of federal highway funds from states that permitted persons under the age of 21 to purchase and publicly possess any alcoholic beverage. The Court observed that "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206 (*quoting Fullilove* [*v. Klutznick*], 448 U.S. [448] at 474 [1980]). *Dole* reiterated, however, that the "spending power is of course not unlimited, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, and n. 13 (1981), but is instead subject to several general restrictions articulated in our cases." 483 U.S. at 207.

As a threshold matter, *Pennhurst* explains why § 409 is not a Spending Clause statute. There, the Court considered whether the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. § 6000 *et seq.*) created rights privately enforceable under 42 U.S.C. § 1983. The Court held that the statute at issue (42 U.S.C. § 6010) was not a "condition" on federal spending because

neither the section nor the Act permitted the Secretary to terminate funding for failure to comply with the terms of § 6010. *Pennhurst*, 451 U.S. at 13 ("Noticeably absent from § 6010 is any language suggesting that § 6010 is a 'condition' for the receipt of federal funding under the Act"); 23 ("If funds cannot be terminated for a State's failure to comply with § 6010, § 6010 can hardly be considered a 'condition' of the grant of federal funds."). Moreover, § 6010 stood "in sharp contrast" to other sections of the Act, which required various actions "as a condition of" receiving federal funds. 451 U.S. at 12-13.

Just as in *Pennhurst*, § 409 lacks any language suggesting that it is a "condition" on federal funding:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected . . . pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence . . . .

23 U.S.C. § 409. Nothing in this section (or in any other portion of Title 23) purports to condition all or any portion of federal highway funds on a state's acquiescence in § 409. Nowhere does Congress require or permit the Secretary to cut off any or all federal funding when, as

here, a state chooses to permit discovery and admission of documents collected pursuant to § 152.[5]

This stands in sharp contrast to other portions of Title 23, which (for instance) expressly (1) require the states to enact or enforce legislation or regulations regarding some behavior (*e.g.*, teenage drinking and driving or highway junkyards); (2) condition funding on compliance; and (3) specify what portion of federal funds the Secretary may withhold due to noncompliance. *See, e.g.*, 23 U.S.C. §§ 131, 136, 158, 159, 161. Section 409 does none of these things. Thus, like § 6010 in *Pennhurst*, § 409 is not a condition on spending.

Section 409 also contrasts sharply with 23 U.S.C. § 402. Section 409 deals with data collected or compiled under the hazard elimination program of § 152, while § 402 deals with collection of data on traffic-related deaths and injuries. Section 402(a) directs the Secretary of the Department of Transportation to "establish a highway safety program," and for the states to collect and report such data as the Secretary may require. Section 402(c) authorizes funds for such a program, and directs the Secretary to withhold funds from any state that does not implement a highway safety program. Section 402(k) prohibits the admission into evidence of § 402 documents. Section 409 contrasts sharply with § 402 by not giving the states any option to refrain from participation in the hazard elimination program of § 152, and therefore by not

[5] Petitioner cites several cases that have found a congressional "intent" to condition funding on § 409, but neither those cases nor the Petitioner cites to any language in Title 23 to support that supposition. *See* Pet. Br. at 25-26.

authorizing the Secretary to withhold any funds from non-compliant states – under § 409, the states have no option but to comply.

By the same token, among the four "general restrictions" on the spending power noted in *Dole*, the second one requires "that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously. . . .'" *Dole*, 483 U.S. at 207-08 (citations omitted). Since § 409 is not a condition on spending and contains no conditional language as discussed above, *a fortiori* it does not unambiguously condition Washington's receipt of federal funds on changing its discovery and evidence rules. Section 409 thus fails *Dole*'s second restriction.[6]

Furthermore, even if § 409 had been unambiguously conditioned on state acceptance, as an historical and legal matter Petitioner and its amici are incorrect to suggest that the Washington Legislature has "accepted" § 409. *See, e.g.*, Pet. Br. at 3, 6, 8 & 27; U.S. Br. at 43. Our Legislature has never accepted § 409 (enacted in 1987) because RCW 47.04.050 through .070 (accepting conditions on federal highway funds) were first enacted in 1917[7] and most recently amended in 1961 and 1984.[8] Under Washington

[6] Indeed, even § 152 does not unambiguously impose a condition on funding. While § 152(d) mentions that the federal government will provide 90% of the funds for approved highway safety improvement projects, it nowhere states that some or all of these funds may be withheld if a state fails to comply with § 152's requirements that the state survey "all public roads" and identify dangers to motorists, bicyclists and pedestrians throughout the state. 23 U.S.C. § 152(a)(1). Nothing in Title 23 makes § 152 a condition on spending.

[7] Wash. Laws 1917, Ch. 76 §§ 1, 5.

[8] Wash. Laws 1961, Ch. 13; 1984, Ch. 7 §§ 86, 87.

law, our Legislature cannot prospectively accept congressional conditions on federal funding. *Diversified Investment v. DSHS*, 775 P.2d 947, 950 (1989) ("It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute.") For this Court to hold otherwise would permit Congress to undermine Washington citizens' ability to hold their legislators accountable by permitting state legislatures to prospectively pass the buck or, more accurately, take the buck and pass the blame, to the federal government. Accordingly, even if § 409 had been written as an unambiguous condition on the receipt of federal funds, the Washington Legislature never accepted the condition, and the Spending Clause cannot authorize Petitioner to withhold relevant documents in discovery.

The lack of any conditional language in or about § 409 leads to a second reason that it cannot be sustained under Congress' spending power: coercion. *Dole* notes that this Court's "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (*quoting Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). This Court concluded in *Dole* that Congress' unambiguous threat (in 23 U.S.C. § 158) to cut off only 5% of federal highway funds if a state did not pass a minimum age drinking law did not amount to compulsion because the states retained the option of saying no and because only 5% could be withheld. 483 U.S. at 211-12.

Unlike § 158, § 409 gives the states no opportunity to say no. The same is true of 23 U.S.C. § 152(a)(1): the states *shall* collect and compile the necessary data. States are not asked or "encouraged" to pass a law, they are

simply told that they may not enforce discovery requests or admit documents collected or compiled for § 152 purposes in their courts. Moreover, these statutes contain no limitations or directions on how much money the Secretary may withhold when, as here, a state concludes that such documents shall be discoverable and admissible in its courts. In light of Congress' utter lack of direction, the Secretary might well feel bound to withhold every penny of federal highway funds until a state buckles under this oppressive congressional command. Both § 409 and § 152 are impermissibly coercive in violation of the states' sovereignty over truly local matters. *See Dole*, 483 U.S. at 211-12.

The third reason that the spending power cannot sustain § 409 is this: control of discovery and admissibility of state-generated documents in state courts on state tort claims is so intrinsically "local" that it does not fall within the "general welfare" for which Congress may expend money, but rather is among the powers retained by the States under the Tenth Amendment. This conclusion follows from two related restrictions on the spending power:

> [T]he exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, "courts should defer substantially to the judgment of Congress. . . ." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Dole, 483 U.S. at 207-08 (citations omitted). As applied here, these two restrictions are "mirror images" of one another because that which is outside the general welfare

is reserved to the States or to the people under the Tenth Amendment:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. United States, 505 U.S. 144, 156 (1992).

In addressing the "general welfare" restriction on the spending power, *Dole* notes that the "breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936) . . . . " 483 U.S. at 207. In *Butler*, this Court did not fully limn the scope of "the general welfare", but rather looked to the Tenth Amendment as its limit:

> We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. . . .
>
> From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited.

297 U.S. at 68 (citations omitted). Under this analysis, *Butler* struck down the Agricultural Adjustment Act of 1933. Thus, *Butler*'s holding on the breadth of spending power is that the Tenth Amendment prohibits federal spending laws that invade the reserved powers of the States.

As *Dole* notes, however, *Butler* also says that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." 483 U.S. at 207, 213 (O'Connor, J., dissenting). As noted above, the holding in *Butler* does not follow from this statement. *See also, e.g.*, David Engdahl, *The Spending Power*, 44 Duke L. Rev. 1, 34-37 (1994) (*Butler* actually adopted Madison's view of the limited spending power, albeit while saying that it was following Hamilton). *Butler*'s very Madisonian view of the Spending Clause (*i.e.*, that "general welfare" only means national welfare) also predominated throughout the first 85 years of the Nation's history. *See, e.g.*, John C. Eastman, *Spending Clause Symposium: Restoring the "General" to the General Welfare Clause*, 4 Chapman L. Rev. 63 (2001); *see also* Alexis de Tocqueville, *Democracy In America*, Vol. 1, Ch. 5, at 61-63 (Vintage, Bradley, ed., 1945) (explaining that in the 1830's, "the Federal government . . . is the exception; the government of the states is the rule."). Thus, *Butler* correctly interpreted the original intent of the Constitution's framers as prohibiting Congress from invading the province of the States through the spending power.

As in *Butler*, then, the Tenth Amendment provides an independent bar to the so-called condition in § 409. The Tenth Amendment reserves the "powers not delegated to the United States by the Constitution . . . to the States . . .

or to the people." U.S. Const., amend. X (emphasis ours). Yet Petitioner and its amici argue that § 409 is a federal "privilege" applicable in state court to cases under state law, designed to benefit state and local governments. *See, e.g.*, States' Amicus Br. 15; U.S. Br. 46.

"The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. It is difficult to conceive of a more truly local matter than the terms and conditions under which a State is willing to waive its sovereign immunity. Washington's Constitution derives all political power from the people of Washington, subjects all governmental entities to their consent, and establishes those entities to protect and maintain their individual rights:

> All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Washington State Const., art. I, § 1. Exercising their plenary power through their Legislature, the people of Washington have waived the sovereign immunity of all state and local governmental entities for tortious governmental conduct. RCW 4.92.090 (state); RCW 4.96.010 (local governmental entities). As relevant here, the people have thus determined that Petitioner "shall be liable for damages arising out of [its] tortious conduct . . . to the same extent as if [it] were a private person or corporation." RCW 4.96.010.

No decision of this Court sanctions so severe an imposition of federal power on truly local matters. The Congress thus has no power to regulate discovery or admissibility of documents in this purely local dispute,

rewrite state civil court rules, impose federal privileges in state-law-based actions against state actors, or to abrogate Washington citizens' decisions to waive sovereign immunity and subject its governments to suit in state court on the same terms and conditions as any citizen.

CONCLUSION

Amici Whitmer respectfully submit that the Washington State Supreme Court correctly concluded that the 1995 amendment to § 409 is unconstitutional. But the State Supreme Court erroneously concluded that the pre-1995 § 409 passes constitutional muster. This statute cannot be sustained under the Commerce Clause, the Spending Clause, or the Necessary and Proper Clause and should be stricken in its entirety.

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